IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 467 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

THAKKOR BAKALJI @ JAYANTIJI UDAJI

Versus

STATE OF GUJARAT

Appearance:
MR HM CHINOY for appellant no.1
Mr. Saurin A. Shah for appellants nos.1,2,4,6,12,14,18, 5,13,15, 17 and 19.
Mr. K.C. Shah, A.P.P. for the State.

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA
Date of decision: 10/02/98

ORAL JUDGEMENT

The appellants original accused are held guilty of offences punishable under Section 302 read with Section 149, Sec.323 read with Section 149, Section 324 read with Section 149 and Section 451 read with Section

149 of the Indian Penal Code and are sentenced to suffer rigorous imprisonment for life, S.I. for one month and fine of Rs.50/- in default, 10 days, S.I. for three months and fine of Rs.150/-, in default, S.I. for six months and fine of Rs.100/-, in default 30 days S.I. respectively. All the accused were acquitted of the offences under Section 135 of the Bombay Police Act. The learned Additional Sessions Judge had ordered the sentence to run concurrently of each of the accused. Against this judgment and order of 29th June, 1991 in Sessions Case no.60/1991 passed by the learned Sessions Judge, Mehsana, present appeal is preferred.

The facts leading to the prosecution of the appellants(hereinafter referred to as the accused) alongwith one Balaji Nathaji who died on 20th January, 1991 after submission of chargesheet however, before commencement of trial are that one Somaji Nathaji (PW 3) had two sons named Alkaji and Bhuptaji and two daughters. One of the daughters was serving in thrashing flour. Her remuneration of about Rs.500/- received was lent by her brother Bhuptaji to Thakore Bakaji Udaji some six months before the date of incident i.e. 18th September, 1990. Bhuptaji used to demand the same and Bakaji Udaji therefore had filed a complaint against Bhuptaji. Despite the same, demand for money by Bhuptaji continued. Keeping this in mind, in the evening of 18th September, 1990 when PW 3 Somaji was sitting at the house of his brother Fataji PW 4, Bhuptaji, his wife Chanda PW 5, Amthiben mother of Bhuptaji were in their house. At this time Thakore Bakaji Udaji, Karnaji Hiraji, Manaji Mansangji and Bakaji Karnaji came rushing near the house of the complainant PW 3. They called the son of PW 3 from his house and were abusing. These four persons were also followed by other persons. All of them were armed and were shouting " How do you demand money repeatedly from Bakaji Udaji?" Bhuptaji son of PW 3 being scared rushed to the house of his uncle PW 4 to save himself. At this point of time all the accused persons rushed behind him and before Bhuptaji entered the house of PW 4 Bakaji Udaji and Bakaji Karnaji gave dharia blow on his head and being injured on the head he fell down in front of the road. All others who accompanied said Bakaji also assaulted Bhuptaji with their weapons. Wife of Bhuptaji PW 5 intervened to save Bhuptaji and she was also injured by Bakaji Karnaji by dharia on her right hand and also by stick blows of Karnaji Hiraji and Jeetaji Ravaji. Thereafter as there was shouting and Bhuptaji was bleeding all these persons ran away. Bhuptaji was struggling for life and died. PW 3 therefore went to Vijapur Police Station and filed a complaint against 20

persons of which Balaji Nathaji had died before commencement of trial.

On offence being registered, the investigation was entrusted to PW 14 who investigated into the matter and on completion of investigation, submitted chargesheet against all the 20 accused in the Court of Judicial Magistrate, First Class, Vijapur who in his turn committed the same to the Court of Sessions at Mehsana. The learned Additional Sessions Judge framed charge against the 19 accused. The accused pleaded not guilty and prayed to be tried.

The prosecution led necessary evidence to prove the charge levelled against the accused and on completion of the prosecution witnesses further statement of the accused were recorded. The accused examined one defence witness Lilaben Tolsangji a minor girl aged about 14 years. They also produced certain documents in their defence. Till their further statement came to be recorded their defence was of total denial. Thereafter, on examination of the defence witnesses, they have tried to explain how Bhuptaji has died. According to the defence Moholla people of Lilaben had assaulted Bhuptaji as they were enraged because of rape committed by Bhuptaji on her. No doubt these were the suggestions put to prosecution witnesses by way of cross examination. In our opinion, this is an attempt to explain how Bhuptaji has died but the defence is that they have not committed this offence. The learned Additional sessions Judge on completion of the evidence for prosecution as well as defence, heard their learned Advocates and held all the nineteen accused guilty of the offence referred hereinabove. This judgment and order is under challenge in this appeal.

This appeal for 19 accused is initially filed by the learned Advocate Mr. H.M.Chinoy. Later on, Advocate Mr. S.A. Shah has filed his appearance for appellants nos.1 to 14. Heard learned Advocate Mr. S.A. Shah for appellants nos.1 to 14. Learned Advocate Mr. H.M. Chinoy though duly informed of the hearing of this appeal for appellants nos.15 to 19 is not present before the Court. We may make it clear at this juncture that all the accused are charged also of an offence punishable under Section 149 of the Indian Penal Code.

We have ourselves perused the record and proceedings of this case. Learned Advocate Mr. S.A. Shah has taken us through the oral evidence of all the witnesses examined on behalf of the prosecution.

Learned Advocate Mr.S.A. Shah has challenged the order of conviction mainly on the ground that the witnesses examined and relied on by the prosecution are all interested and partisan witnesses. In view of the contradictions in their evidence their evidence is not acceptable. He supported this contention by an additional fact that though independent witnesses were available the same are not examined by the prosecution. Therefore evidence of the prosecution witnesses requires to be rejected and the learned Addl.Sessions Judge has erred in acting and relying on this evidence of interested witnesses. The defence witness a minor girl of about 14 years old has come forward with a say that deceased committed rape on her return from sim/field. When her Moholla people came to know about the same they got enraged, went to the house of deceased Bhuptaji and had assaulted him. Mr. Shah therefore contended that in view of this defence it is the Moholla who have assaulted the deceased and not the present accused. The present accused are wrongly roped in by the prosecution witnesses because of their enmity with the deceased and his family members. Mr. Shah further contended that the enmity between the family of the deceased and the present accused was to the effect as alleged in connection with the demand of Rs.500/- by the deceased from the accused no.1 and denial of the accused no.1 to pay the same. According to the defence, it was the deceased who was a strong headed man against whom the accused no.1 had to file a complaint which is part of the record. Mr. Shah further contended that the injuries caused on the person of the deceased and the weapons attributed to the accused do not reconcile in view of the oral evidence of the prosecution witnesses. Mr. Shah contended that the motive as alleged by the prosecution is not that sufficient that a man may commit such an act. Mr. Shah, in the alternative, contended that even on facts as stated by the prosecution witness and as suggested by the defence witness, the object of the assembly cannot be said to be to commit murder but that would be only to teach a lesson to the deceased that what he did with defence witness was not just and proper and he may not commit the same again or with anyone else. Mr. Shah, therefore contended that the oral evidence does not inspire confidence and creates doubt about the presence of the accused at the relevant time. The accused should have been given the benefit of doubt in view of this contention. Mr. Shah further contended that the incident took place at about 7.00 or 7.30 p.m. in the month of September when there was no sufficient light and visibility, and therefore accused could not have been

identified verbatim as stated by the prosecution witness. There is nothing on record to show that there was sufficient light to identify the accused. Mr. Shah therefore contended that on this count also the accused should get the benefit of doubt.

Learned A.P.P. Mr. K.C. Shah supports the judgment and order of the learned Sessions Judge. The learned A.P.P. Mr. Shah contended that as many as 19 accused have assaulted the deceased and keeping in mind the time of incident, all the prosecution witnesses were at whom and can be assumed to be at whom as all the accused belong to the same village named Techava. They are not unknown to each other. The learned A.P.P. Mr. Shah contended that all the accused persons are related to each other and there is a transaction of money lending by PW 3 and/or his son who is accused no.1. Therefore with the light which can be available in September at about 7.30 p.m.identity cannot be that difficult.

Mr. Shah, learned A.P.P. further contended that the defence witness, on the contrary, can be broadly said as supporting the prosecution case by saying in the cross examination to the effect that the residents of her street came to know about the misbehavior of the accused with her. Therefore all the residents went to the residence of Bhupataji and Bhupatji was killed and all these residents are arrested. Mr.Shah learned A.P.P. therefore contended that the short question, even if we accept the defence story, then remains to be considered is whether the incident of assault on Bhupatji took place because of rape on defence witness or because deceased has demanded money from the accused no.1 and the Court has to consider which of the fact is probable and consistent with the commission of the offence. Mr. Shah further contended that if the injury caused on the person of the deceased is not consistent with the weapon attributed to the accused then such a thing is likely to happen when as many as 20 persons have assaulted on one person and this will not affect the case of the prosecution in view of the fact that all of them are charged under Section 149,IPC. Mr. Shah, learned A.P.P. further contended that it cannot be simply an object to beat and teach a lesson to the accused by the members of the assembly which was an unlawful one. Even a simple object to beat will make that assembly an unlawful one. It is not necessary that only the initial object of the unlawful assembly is required to be looked into but the conduct of the assembly will hold responsible the other members of the assembly. Mr. Shah, learned A.P.P. therefore contended that the appeal is liable to be

dismissed. Mr. Shah also contended that there is no substance in the alternative case advanced by the learned Advocate for the accused.

Before we deal with the contentions in detail, it will be relevant to refer to the prosecution witnesses. In our opinion, in view of the injuries on the person of the deceased, there can be no dispute to the fact that the deceased had died a homicidal death. There are as many as 18 external injuries and 9 internal injuries on the person of the deceased which are as under:

External injuries:

1. Oblique spindle shape incised wound(IW) over the middle to rt. occipital region directed from upwards to downwards 3.75" x .5" deep brain memb.

2. Oblique spindle shape IW 1/2" left to lower end of injury no.1 over the lt occipital parital region 5" x .5" dep brain memb.

3. Oblique spindle shape IW 1" below the upper end of inj.no.2 over the lt parital region directed from upwards to downwards 1.5" x .5" deep bone.

4. Oblique spindle shape IW over the lt parital occipital region parallel to injury no.2 1.5" away from each other directed from upwards to downwards i.e. parital to occipital 2.5" x .5" deep brain memb.

5. Oblique spindle shape IW over the left parital region between injury nos.2 and 4 and parallel to injury no.3 and 1" away from no.3 1.5" x .5" deep bone upwards to downwards.

6. Oblique spindle shape IW over the lt parital region parallel to injury no.5 and 1/2" away from that directed from upwards to downwards 3" x .5" deep brain memb.

7. Verticle IW spindle shape over the glabella meeting point of two parital and one occipital bone directed upwards to downwards 1/2" left or away to upper end of injury no.1. 1" x .25" deep bone.

8. Oblique spindle shape IW over the right occipital parallel and 1" away from inj.no.1 directed from upwards to downwards 2.5" x .5" deep bone.

9. Oblique spindle shape IW over the right parito occipital region making 60 degrees angle with upper end of injury no.8 directed from parital to occipital region. 1.75" x .25" deep skin.

10. Vertical spindle shape IW over the lt temporal of cheek 1" away from lt eye and 2.5" away from left ear. 2.5" x .5" deep bone directed from upwards to downwards.

11. Oblique spindle shape IW over the lt shoulder region superior aspect 4.5" x 2.5" x .5" deep muscle directed from left to right.

12. Vertical scratch over the rt scapular region 5".

13. Oblique incised wound over the lt. scapular region 3" away from injury no.12. .75" x .25" deep skin.

14. Vertical IW over the lt. shoulder region 1" x .25" deep bone. Vertical linear crack on the lt clavicle shoulder end.

15. Two oblique IW over the right scapular region parallel to each other and 1/2" away from each other .5" x .25" deep skin.

16. Vertical IW over the rt palm 3.5" x .5" deep bone.

17. Detachment of rt. index and middle finger from 2nd phalanx. Cut margin seen on the rt index and middle finger.

18. Fracture rt. ring finger 1st proximal phalanx and connected only with skin to bone. cvt. skin seen.

Internal injuries

1. Oblique linear fracture according to injury no.1 & Col.no.17 1" x .25" middle of injury deep memb.

2. Oblique linear fracture according to injury no.2 Col.No.17 1.25" x .25" middle of inj. deep memb.

3. Oblique linear crack according to inj.no.3 5" length Col.No.17.

4. Oblique linear fracture according to inj.no.4 of .75" x .25" deep memb. Col.No.17.

5. Oblique linear crack according to inj.no.5 of .5" length Co. No.17.

6. Oblique linear fracture according to inj.no.6 of 1" x .25" deep memb. Col No.17.

7. Vertical linear crack according to inj. no.7 of .5" length Col. No.17.

8. Oblique linear crack according to inj.no.8 of 1" length Column No.19.

9. Vertical linear fracture of lt temporal according to injury no.10 of column no.17 1" x .25" deep.

PW 1 Dr. Hasmukbhai Goswami has shown that the internal injuries are corresponding to the external injuries. He has also stated that external injuries nos.1, 2, 4 and 6 are sufficient to cause death in the ordinary course of nature. He has not noticed any stab wound on the deceased. Thus, from the evidence of this witness, it is clear that deceased has died a homicidal death.

Before we appreciate the evidence of other witnesses we would like to find out as to where is the scene of offence from the houses of the witnesses examined and referred to by some of the witnesses and not examined by the prosecution. Map Exh.53 is duly proved by the evidence of PW 2 Arvindbhai. In the said map houses are shown and they are marked with nos. 1 to 14. Incident took place in between the houses which are Mark 2 and 3. Mark 2 is the house of PW 4 and Mark 3 is the house of PW 3. PW 5 and PW 3 are residing in house Mark 3. The occupant of house Mark 1 is one Chaganji who is alleged to have witnessed the incident, however, he is not examined by the prosecution. Another woman Kalaben is also alleged to have scene the incident, however, she is also not examined. From the map, it is difficult to find out, rather it is not shown as to where the house of Kalaben is located. One of the contentions of the learned Advocate for the defence is that PWs 3, 4 and 5 who are alleged to be eye witnesses do not refer to the presence of independent witnesses Kalaben and Chaganji and therefore the possibility of their having seen the incident becomes doubtful. As in the map it is neither shown where the house of Kalaben is located nor the defence has come out with the suggestion as to where her house is located in the map, it is difficult to say

whether P Ws. 3,4 and 5 could have seen her when the incident took place. Location of the house of Chaganji is at fig. mark 1 and when incident took place between the house of PWs 4 and 3 attention and concentration of the witnesses will be towards the incident and not towards the house fig. Mark 1 and therefore it they do not refer to the presence of Chaganji that does not make it unnatural or entitle their evidence to be rejected. We may state at this juncture that when a particular incident took place and when one of the kith and kin is being assaulted then the persons may have their attention and concentration towards the incident and not towards the person with a view to notice as to who are witnessing the incident. Therefore, not noticing presence of Chaganji by any of the PW 3, 4 and 5 is not an unnatural conduct. On the contrary, in our opinion, it is more natural as their attention would be to the incident and not to the surroundings. Therefore not referring presence of Kalaben and Chaganji by P Ws 3, 4 and 5 does not make their evidence either doubtful or an unacceptable one.

We may also make it clear at this juncture that non examination of Kalaben and Chaganji does not affect the prosecution case. For non-examination of a witness, law provides for drawing adverse inference. We may also agree to this proposition that adverse inference should be drawn for non examination of witnesses. The question, however is: What adverse inference should be drawn? In our opinion, learned A.P.P. Mr. Shah rightly stated that adverse inference to the effect that these two witnesses do not know about the case of prosecution can be drawn. He contended that adverse inference to the effect that the prosecution case is wrong or false one cannot be drawn. He also contended that an adverse inference to the effect that these witnesses were knowing about some different men or persons as accused than the prosecution witnesses refer also cannot be drawn. If such an inference was required to be drawn, then it was the duty of the defence to examine them as defence witness or make such sugestion in cross examination of witnesses to bring on record the facts which they want to infer by way of adverse inference. Mr. Shah has relied on the judgment in the case of Pal Singh and others vs. State of U.P , A.I.R 1979 SC 1116. The relevant observation in paragraph (2) reads as under:

" Even if the High Court may not have been wholly correct on this aspect of the matter, the fact remains that after the High Court had believed the eye witnesses Nos.1 and 2, and having found that their testimony was

absolutely creditworthy and truthful, it could not have rejected the prosecution case merely because some of the eye-witnesses mentioned in the F.I.R. were not examined. In such cases, the question which has to be determined is not whether the absence of the examination of the independent witnesses would vitiate the prosecution case by itself but that the evidence actually produced is reliable or not. Once the Court gives a finding of fact that the evidence led by the prosecution is reliable and trustworthy, the infirmities arising out of non-examination of witnesses will not be sufficient to put the prosecution out of Court."

Therefore, in the instant case, what is required to be considered is whether the evidence of P Ws. 3, 4 and 5 is acceptable or not. If not acceptable then non examination of these independent witnesses need not be bothered but if acceptable non examination does not affect the prosecution case.

Now the question is whether evidence of P Ws 3,4, and 5 is reliable or not. PW 3 Somaji Nathaji has deposed as under:

" Bhupatji was residing with him. Name of his wife is Chanda.....Name of my brother is Fataji. He resides in a house near to him. We have lent Rs.500/- to accused no.1. The same was lent by my son. It was promised to be paid back within two months, however, the same was not paid. Demand therefore was made, yet monies were not paid. However, he was reacting to the same when the demand was made. He tried to assault and accordingly he had filed a complaint for the same. Incident took place some eight months back. It was the first day of Northa. Incident took place at about 7.30 night. In my house Bhupat's wife Chanda, Bhupat, and my wife were present. I was at the house of Fataji. I was sitting in the courtyard of Fataji. In the house of Fataji, Fataji, his wife Rai,daughter Kala ,and son Dashrat were present at home. Fataji was taking his supper. Dashrat came to courtyard after supper. At that time Kala was serving grass to cattle. Bakaji Udaj, Manaji Mansangji, Bakaji Karnaji and Karnaji Hiraji came to assault at the place where I was sitting. Addressing to Bhupatji they were saying " You come out , we may pay your money" . They were followed by other persons who were also giving abuses.....On seeing these persons Bhupatji ran towards the house of Fataji on the North. All ran after Bhupat.....from amongst all Bakaji Udaji gave dharia blow on the rear side of the head of Bhupat , Manaji Mansanghji gave axe blow on the head, Karnaji Hiraji gave

stick blow, Bakaji Karnaji gave dharia blow on the head. Manaji Shankerji gave axe blow on the right shoulder, Chamanji Vanaji, Amratji Shivaji Babuji Manaji, Chunaji Hiraji, Nenaji Talaji all gave dharia blow on the head, Valaji Jawanji gave sword blow on Bhuptaji. Bhuptaji warded it by his right hand as a result of which two of his fingers chopped out. Sarthanji also gave sword blow on Bhuptaji's hand and cut off Bhuptaji's fingers. When Fataji intervened he was also given stick blow on his hand by Jeetaji. Sardarji had a stick which he struck on the wrist of Chandaben. Amratji Sardarji gave stick blow on Bhupatji. Bakaji Karnaji gave dharia blow on the right hand of Chandaben. All started giving blows and all were saying to kill him. They were saying that we do not want him to go alive. Bhuptaji fell there and all these persons ran away towards the South. At that time Bhupatji was lying in front of the house of Fataji. This part of the evidence of PW 3 is further corroborated by evidence of PW 4 and 5. In our opinion, this evidence of PW 3 is further corroborated by evidence of PW 1 read with PM note Exh.41.

The evidence of PW 3 is challenged on the ground that he was not present there and therefore he had not seen the incident. His evidence is further challenged on the ground that even if he was present there, there was no visibility as it was at about 7.30 p.m.of the month of September. It is further contended that evidence of this witness cannot be accepted as he is guilty of exaggerating his case which is proved by the fact that he added as many as six names later on. It is further stated that the evidence of this witness cannot be believed as motive alleged is such which is not sufficient and complaint is registered after verifying the injuries on the person of the deceased and as many persons as they can are being roped in. Incident took place no doubt at 7.30 p.m., however, in front of the house. Normally, it being first day of Northa and being supper time, the members of the family would be in the house. There is nothing on record to show that PW 3 was not injured or was not present at that time. If PW 3 wanted to support the case of the prosecution or he wanted to offer over act in the matter he could have equally said that he was in his house. Why should he say that he was in the house of PW 4 Fataji. On going through the judgment, it appears that the learned Additional Sessions Judge has looked into the calendar of the relevant year and date and it is observed that on that day it was Amavasia. Be that as it may, it is not the case of the defence that there was no visibility at the relevant time. It is for the first time that such an

argument is advanced before this Court. In our opinion, this contention should not detain us more as it requires to be supported by necessary evidence and there is no evidence to that effect on record. Another question about the credibility of this witness is based on his adding additional six names in his further statement. This witness is the father of the deceased. The incident took place in front of his house in his presence. One must bear in mind what could be the mental condition of such person immediately after the incident. It may be that at the time when the complaint was filed he may not be in a good composure and due to anxiety he might have forgotten some names and this led to recording his further statement by the police where he has disclosed the names of other six persons. However, addition of these six persons has not turned out to be a concoction or an improvement but it is further proved and corroborated not only by other oral evidence but also by medical evidence. Thus, we do not find any reason or material on record to doubt the evidence of PW 3.

This brings us to the evidence of Fataji PW 4 who is the brother of the complainant PW 3 and uncle of the deceased. His evidence is challenged on the ground that despite he being uncle of the deceased has not tried to intervene or save the deceased. It is true that he said in his evidence that he has not tried to intervene or save the nephew. He assigned the reason that he did not intervene because he was afraid. However, his presence is proved by the fact that at that point of time when the incident occurred he was injured by stick blow of Jeetaji Ravaji. He was taken to the Dr. immediately on the next day morning for treatment where he has given the history of previous night assault. The incident took place in front of his house. He is an injured witness and we are not able to find anything from his cross examination which may dissuade to accept his say. Mr. Shah for the defence contended that he has not referred to money dispute as referred to by PW 3. Simply because he has not referred to the cause of incident as the money dispute, that by itself does not make his evidence unacceptable. On the contrary he has stated in his examination-in-chief that prior to the incident there was some dispute about money. He has in his evidence referred to the names of each accused ascribing him the respective weapon. Thus in our opinion evidence of this witness either supports and corroborates the evidence of PW 3 or gets corroboration and support from PW 3.

This brings us to the evidence of PW 5 Chandraben. PW 5 is now widow of deceased Bhupat. She

was aged about 26 on the relevant date. She stated that all came in our courtyard. They were telling my husband " You come out, we may settle our account. Persons whom I have seen are all present. I know them by name and face. She has then referred to the accused with respective weapons. She is not able to give names of one or two accused and they are namely, Jeetaji Ravaji and Valaji Shankerji, however, she identifies by saying that these persons were there and they had particular weapon.....My husband then ran towards the house of Fataji. Persons who had come there also ran behind my husband towards the house of Fataji. When my husband had reached near the door of Fataji, they started assaulting him. They were all hitting on the head. Then he fell facing the ground. I have seen Bakaji beating. He gave dharia blow on the head. The other Bakaji also gave dharia blow. As Bhupatji fell down all of them assaulted him. I tried to save him but Bakla gave a dharia blow on my elbow. Sardarji gave stick blow on my wrist. Jeetaji gave stick blow on my back. I, therefore, moved aside and they all ran away. According to this witness, cause of quarrel is money lent to Bakaji. In cross examination the witness has stated " It is true that my husband sat down near the house of Fatabhai on receiving two blows. As Valaji gave blow of sword my husband fell down. He fell down with face downwards. I was in the Osri of Fatabhai. At that time I was assaulted. I, therefore, moved and intervened to rescue him. I waived my hand saying, " Let him go". To save I had caught hold of Bakla so he struck the pointed edge of dharia on me. At that time all the others were assaulting him. Fataji had caught hold of my husband , however, while standing he was telling, " Leave him, leave him." On my clothes it was my blood and not of my husband. Blood of my husband did not stain me.....I have not stated names at the say of someone. I do not know the name of father of the accused. It is not true that the accused father's name is stated at the instance of the police. I cannot give the name of the father of any one. At that time I knew the name of the father of the accused and therefore, I had stated. At present, I do not know the name of the father of the accused."

The witness by saying so wants to convey that at the time of incident she knew the name of the father of the accused, however, on the date of deposition what she wanted to convey was that she did not remember the name of the father of the accused. Incident is of September, 1990. Deposition is recorded in May, 1991. Only the wearer knows where the shoe punches. This witness is widow of the deceased. The alleged incident took place

in her presence at her house and she was helpless and could not save or rescue her husband. Her statement was recorded after midnight. After her statement was recorded by the police she was sent to Doctor. It is one of the contentions of the learned Advocate for the defence that if she was knowing as to who injured her she ought to have given the name of her assailant when Doctor asked about the history of injury. When she has not stated the name of any one, her evidence in particular disclosing the names of the accused, if it cannot be said to be a false one it is a doubtful one, and therefore, the benefit should go to the accused. Why is this witness not giving the name of her assailant to the Doctor. It will be relevant to state that she is sent to the Doctor with a police Yadi. The fact that she was sent to the Doctor with a police Yadi makes to presume that she may have disclosed before the police that she was injured and by whom in the alleged assault of her husband. However, her statement appears to have been recorded after the Doctor examined her. It is specifically stated in Exh.75 that at that time his sons wife Chandra was also injured on her right hand elbow with dharia by Bakaji Karnaji and with stick by Karnaji Hirabji and Jeetaji Ravaji. She was injured on her body, on the wrist and on her back. When the name of the assailant is disclosed prior to the Doctor examined her, non disclosure of the name of the assailant before the Doctor is of no significance. So also name of the assailants of PW 4 are also disclosed in that very complaint. Name of the assailants are disclosed in the complaint, and therefore, if the names are not disclosed before the Doctor when he was recording the history, no importance should be attached like one if the injured had reached or approached the Doctor before police.

The evidence of PW 5 is challenged on the ground that she does not know the name of the father of the assailants. In villages there are different persons with similar names and unless the names of the father is known identify of the person cannot be fully established. It is true, however, this witness has given the names of the father of the accused in her police statement. She has identified the persons before the Court, and therefore, in our opinion, admission on her part in cross examination that today she does not remember the name of the father of the accused does not affect her creditability. In our opinion, the evidence of this witness is further corroborated by the evidence of P Ws 3 and 4 also.

The evidence of these three eye witnesses,

namely, P Ws 3, 4 and 5 is also challenged on the ground that the names of the accused are stated in the complaint after manipulating the same. Learned Advocate Mr. Shah to support this contention relies on the fact that the first information report in statutory form does not bear the thumb impression of the complainant. The complaint which bears the thumb impression of the complainant is on a loose sheet of paper, and therefore, when the statutory form of the complaint does not bear thumb impression atleast the complaint becomes a suspicious one and therefore, it should be looked upon with great caution and could not be relied upon without any independent corroboration. If Investigating Agency has joined hands with the complainant, then in our opinion, it was difficult for the investigating agency to get thumb impression on a statutory form of the complaint. Simply because the statutory form of the complaint does not bear the thumb impression of the complainant, that by itself is not a circumstance to doubt the correctness of the complaint. PW 3 after the incident had gone to Vijapur Police Station where Police Sub Inspector has recorded the complaint at 23.50 hours. The complainant has reached the police station some 45 minutes before 23.50 hours. The PSI has recorded the complaint and has taken thumb mark of the complainant on each page of the complaint. Complaint, in the instant case, Exh.75 is recorded by PSI, PW 13. Statutory complaint registered is always in custody of police station officer in police station. If a complaint is recorded by a person other than police officer, the same may not be in the statutory form. In the instant case, after the PSI recorded the complaint, he has sent the same to the Police Station officer to record the complaint. The defence is not able to show any variance between the complaint registered by PSI and one recorded in the first information report. Simply because the complaint is registered on a loose sheet of paper, keeping in mind the evidence of PW 13, we are not able to hold anything adverse in that regard. Thus, we do not find any substance in the contention of the learned Advocate for the defence that the complaint is registered after manipulation and is concocted one after verifying the injuries on the person of the deceased. It is not that a dead body of Bhupatji was found and then the complaint was registered. Bhupatji is injured in front of his own house. It is not suggested by the defence that he was injured somewhere else and the dead body is brought near his house and that scene of offence is shifted by the prosecution. When the incident has taken place in front of the house of the deceased and the members of the family were present in the house there is no reason to disbelieve their say that they have seen

the incident and the persons involved in the same. This part of evidence in our opinion is supported by the defence witness. She has stated as referred to by learned A.P.P. that the neighbours came to know about it. My brother had not gone to the police station. I remained at home. Neighbours went to Bhupat's house. Bhupat was killed. Neighbours were arrested by police. Neighbours told police that Bhupatji misbehaved with me. This fact suggests that the defence witness very well knew that her neighbours had gone to the house of Bhupat where they have killed him and they are all arrested. It will be relevant to refer to the time of arrest of each of the accused. Twelve of the accused were arrested on 19th September, 1990, two of them were arrested on 21st September, 1990 and six were arrested on 29th September, 1990. Names of 14 accused were disclosed at 23.50 hrs. of 18th September, 1990 and names of other six were disclosed in the morning of 19th September,1990. No doubt the prosecution has not come out with a case that the six accused who were arrested on 29th September, 1990 were absconding. However, in the course of investigation they are arrested. Thus, we do not find any substance in the contention that FIR was registered after concoction and on manipulation after verifying injuries on the person of the accused.

From the defence witness the fact that emerges is that in the evening of 18th September, 1990 deceased was assaulted by her neighbours and was killed. The question is whether these accused are her neighbours or not; or some other persons are her neighbours? It was the duty of the defence to establish or atleast create a suspicion that the accused are not her neighbours and are someone else. Before us, the fact is that in the evening of 18th September, 1990 Bhupatji was assaulted and killed. The defence witness has stated that her neighbours had gone to the house of Bhupatji and he is killed. Prosecution witnesses have said that Bhupatji was killed in the evening of 18th September, 1990 in front of their house and they have within a short time disclosed the name of the assailants. There is nothing on record to show that police had also arrested person other than the accused from that village. Therefore, in our opinion, the conclusion arrived at by the learned Sessions Judge does not call for any interference.

The learned Advocate Mr. Shah has very strenuously contended before us that the motive advanced by the prosecution does not suggest that any of the accused had an intention to kill the deceased. They have assembled , if so concluded by the Court, then not with a

view to kill him but with a view to teach him a lesson or to cause some minor injury in view of the fact that deceased had committed rape on Lilaben. Whether motive is sufficient to kill a person or not can be inferred from the injuries caused on the person. We have referred to earlier that four injuries out of 18 are individually sufficient in the ordinary course of nature to cause death. The said injuries are injuries no.1, 2, 4 and 6. They are all head injuries. If we analyse the injuries then out of 18 external injuries, 9 injuries are on head of the deceased. One injury is on left cheek, six injuries are on the shoulders - three on the left and three on the right, remaining 2 injuries are on hand whereby fingers are cut off. Out of 9 injuries on head, four of them are sufficient in the ordinary course of nature to cause death. If accused had no intention to kill by the injury caused on the head part of the body in view of the observation in the case of Virsa Singh Vs State of Punjab, AIR 1958 SC 465 , it was necessary for the defence to suggest that they had not intended these injuries on the head or they had not intended these injuries which are caused on the person of the deceased but some other injuries were intended and by accident or by movement of the accused they had fallen on the site which has become fatal. Therefore, in our opinion, it cannot be said that there was no intention to kill because the motive may does not appear to be sufficient that a man would commit murder for the same. Apart from this, all the accused are charged and convicted under Section 149 of the Indian Penal Code. It is clear from the evidence of the defence witness that Moholla persons had gone to the house of deceased as they came to know that Lilaben was raped and they had killed him. It is very clear that they had a common object to commit an offence. It can be said that they have tried to take law in their hand. Even if we assume that they had gone there to protest against the commission of rape on Lilaben, Section 149 of the Indian Penal Code provides that every member of an unlawful assembly is guilty of offence committed in prosecution of a common object. All the members of the assembly i.e. accused have gone there with dharia, sticks, sword and spear. Except sticks all the weapons are deadly weapons. Stick becomes a deadly or an innocent one, however,from the use thereof but when the arm was carried by the members of the assembly, it can be presumed that it was taken for the purpose of using the same or knowing that it may be used. Thus, in our opinion, there is no reason to agree with the contention of Mr. Shah that they had no intention to cause death of the deceased and the case may not fall within the purview of Sec.300 of the Penal Code. In our

opinion, even the suggestions in the cross-examination of the prosecution witnesses do not bring the case of the accused in any of the exceptions to Sec.300. The learned Sessions Judge has, therefore, rightly held all the accused guilty of the offence for which they are charged.

The learned Advocate Mr. Shah has also contended before us that assuming that the accused have injured the deceased by weapons alleged by the prosecution, then also, the injuries are not caused with force which may lead to an inference to kill the person. To substantiate this argument, Mr. Shah has relied on the evidence of Dr. Hasmukhbhai, PW.1 where the Doctor in his cross-examination has stated that external injuries nos.1 to 9 are linear fractures and if the weapons ascribed to each of the accused if used with force it would have caused depressed fracture. According to Mr.Shah because injuries nos.1 to 9 are linear fractures and not depressed fractures it can be assumed that weapons though used were not used with force. Fractures, be it linear or depressed, are injuries nos.1 to 4 and 6 , however, as stated by the Doctor they are sufficient in the ordinary course of nature to cause death.

Mr.Shah has further contended that the evidence of witnesses appears doubtful for the simple reason that though certain weapons are ascribed to the accused by the prosecution witnesses and that accused have given blows with said weapons, yet no injury which could have been caused by such weapons are found on the person of the deceased. We would like to say that when there is an assembly of about 19 persons and if they have weapons with them witnesses may feel and not wrongly that assailants are inflicting blows with their weapons but it is not necessary that each blow of each weapon should fall on the deceased. It is not necessary that each weapon should have caused injury on the person of the deceased. Many times it may happen that when there are number of assailants with weapons, whosoevers blow of dharia or stick falls first on the victim, that weapon itself wards off the subsequent blows by other such weapons. Therefore, witnesses may feel that blow is given, but it may not fall on the deceased. It may not cause injury also. Therefore, absence of injury by some weapon does not necessarily lead to an adverse inference. This contention stands answered by the judgment of the Supreme Court in the case of Lalji and others vs. State of U.P.,A.I.R. 1989 S C 754 contends Mr.K.C.Shah, learned A.P.P. It reads as under:

"9. Section 149 makes every member of an unlawful

assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defrence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object."

"10. Thus once the court hold that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it."

Learned Advocate for the appellants nos.15 to 19 is absent. However, arguments advanced by the learned Advocate Mr. Shah for appellants nos.1 to 14 has covered the case of accused nos.15 to 19 also at our request. Learned Advocate Mr. Shah had addressed on behalf of appellants nos.15 to 19 also at our instance and in view of the charge under Sec.149,IPC, the case of all the accused is covered and is not separable.

In the result, the appeal fails and is dismissed. Bail bonds of appellants nos.15 to 19 are cancelled. They shall surrender immediately.

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sf-sms